

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Electronically Filed

NATIONAL MINING ASSOCIATION, <i>et al.</i> ,)	
)	
Plaintiffs,)	Nos. CIVIL ACTION 10-1220(RBW)
)	CIVIL ACTION 11-0295(RBW)
v.)	CIVIL ACTION 11-0446(RBW)
)	CIVIL ACTION 11-0447(RBW)
COMMONWEALTH OF KENTUCKY,)	
Energy And Environment Cabinet)	
)	
Plaintiff-Intervenor)	
)	
LISA JACKSON, Administrator,)	
U.S. Environmental Protection)	
Agency, <i>et al.</i> ,)	
)	
Defendants,)	
)	
and)	
)	
SIERRA CLUB, <i>et al.</i> ,)	
)	
Defendant-Intervenors)	

AMENDED COMPLAINT IN INTERVENTION FOR
DECLARATORY AND INJUNCTIVE RELIEF
OF PLAINTIFF-INTERVENOR
COMMONWEALTH OF KENTUCKY

Comes the Intervening Plaintiff, Commonwealth of Kentucky, by and through the Kentucky Energy and Environment Cabinet, (hereinafter "Plaintiff-Intervenor"), by counsel, and for its Amended Complaint in Intervention, states the following:

1. This action arises under the Federal Water Pollution Control Act ("Clean Water Act" or "CWA"), 33 U.S.C.A. §§ 1251- 1387, CWA §§ 201- 607.

2. This amended complaint is being filed pursuant to the Scheduling Order entered by the court on September 16, 2011 (Doc #94). The Plaintiff-Intervenor incorporates by reference all of the facts and allegations contained in its original Complaint in Intervention as if set out fully herein.

I. INTRODUCTION

3 The Clean Water Act prohibits the discharge of any pollutant to the waters of the United States without a permit issued pursuant to the National Pollutant Discharge Elimination System (NPDES) program. 33 U.S.C. § 1342(a), Clean Water Act (“CWA”) § 402(a). Effluent limitations are imposed in the permit in order to control the amount of pollutants discharged. EPA initially issued all NPDES program permits. Subsequently, EPA has delegated to qualifying states the right to issue NPDES Permits within their state boundaries. The Commonwealth of Kentucky was delegated authority to issue NPDES permits in 1983. The Cabinet issues Kentucky Pollutant Discharge Elimination System (KPDES) permits within the borders of the Commonwealth, subject to EPA review pursuant to the “National Pollutant Discharge Elimination System Memorandum of Agreement Between the Commonwealth of Kentucky and the United States Environmental Protection Agency Region IV” (“MOA”). *See*, MOA attached hereto as Exhibit 1.

4. It is Congress’ stated intention to “recognize, preserve and protect the primary responsibilities and rights of states to prevent, reduce and eliminate pollution.” CWA § 201(b), 33 U.S.C. § 1251(b). EPA has no authority to establish water quality standards *unless* the Administrator of EPA “determines that a new or revised standard is necessary to meet the requirements of” the Clean Water Act, and then only through formal notice and comment rule making under the Administrative Procedures Act. CWA § 303(c)(4), 33 U.S.C. § 1313(c)(4).

5. Discharges to the waters of the Commonwealth from coal mine operations must qualify for coverage under either the Coal General Permit, KPDES Permit No. KYG040000, or under an individual permit.

6. In a NPDES/KPDES permit there are two types of limits imposed in order to control the pollutants discharged in the effluent: technology-based limits which are imposed through the application of effluent limitations guidelines promulgated by EPA pursuant to Clean Water Act § 301, 33 U.S.C. § 1311, and water quality-based effluent limitations which are based on water quality standards established and implemented by the states pursuant to CWA § 303, 33 U.S.C. § 1313.

7. The states, as Section 402 permitting authorities, determine in the first instance whether a proposed discharge will, after complying with the technology-based effluent limitations, have a reasonable potential to cause an in-stream excursion above a numeric or narrative criterion within an applicable water quality standard, *see* 40 C.F.R. 122.44(d). This determination is known as a “reasonable potential analysis” or “RPA”.¹ When application of a technology-based effluent limitation will not ensure the discharge complies with applicable state water quality standards, the state must develop water quality-based effluent limitations to comply with those water quality standards. CWA § 303, 33 U.S.C. §1312.

8. Pursuant to Congress’s allocation of authority under the CWA, the Commonwealth of Kentucky has the authority to establish water quality standards that it determines will best protect the overall well-being of Kentucky’s waters. Kentucky has promulgated both numeric and narrative water quality standards, including:

¹ Kentucky’s Permitting Procedures for Determining “Reasonable Potential”, May 1, 2000, were approved by EPA on July 7, 2000. See, attached hereto as Exhibit 6, letter dated July 7, 2000 to R. Bruce Scott

(a) 401 KAR 10:031, Section 4(1)(f). “Total dissolved solids or specific conductance shall not be changed to the extent that the indigenous aquatic community is adversely affected.”

(b) 401 KAR 10:031, Section 2. “Surface waters shall not be aesthetically or otherwise degraded by substances that ...injure, are chronically or acutely toxic to or produce adverse physiological or behavioral responses in humans, animals, fish and other aquatic life.”

9. Kentucky’s water quality standards were approved by EPA as recently as August 1, 2010.

10. Notwithstanding the States’ primacy under the Clean Water Act in developing water quality standards, and without promulgating a standard through required notice and comment procedures, EPA has since April 1, 2010 unlawfully reviewed, and objected to, KPDES permits proposed for coal mining operations in Kentucky, for compliance with an unpromulgated water quality standard for conductivity.

11. Kentucky has had primacy to issue NPDES permits in the Commonwealth since 1982. EPA has been reviewing NPDES permits issued in Kentucky for coal mining operations since 1983 and has never, before April 1, 2010 objected to a coal permit.

12. Kentucky revised and re-issued its Coal General Permit, effective August 1, 2009. EPA approved the Coal General Permit, KPDES KYG0400000 in June, 2009.

13. EPA has approved Kentucky’s 305(b) reports², including its method of assessment and interpretation of Kentucky’s narrative water quality standard for conductivity, each year since 1983.

² Prepared and submitted pursuant to 33 U.S.C. § 1315, CWA § 305.

14. Kentucky's water quality standards, including its narrative standard for conductivity, was most recently approved by EPA on August 31, 2010. Such approval is a determination by EPA that such standard is consistent with the requirements of the Clean Water Act. CWA § 303, 33 U.S.C. § 1313(a)(1).

15. Kentucky law prohibits the use of "guidance" to implement regulatory programs. KRS 13A.130.

16. The Kentucky Energy and Environment Cabinet intervenes herein and brings this complaint to challenge recent actions by the Defendants, and in particular the reliance by EPA upon its July 21, 2011³ document entitled "Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act, and the Environmental Justice Executive Order" (hereinafter, "Final Detailed Guidance") in its review, comments, and objections to draft Kentucky Pollutant Discharge Elimination System ("KPDES") permits proposed by the Cabinet pursuant to KRS Chapter 224 and the Clean Water Act. *See*, attached hereto as Exhibit 2, an accurate copy of the Final Detailed Guidance.

17. The Commonwealth brings this action on behalf of its sovereign interest in its rights to due process, equal protection, and protection from arbitrary action, and its interest in protecting the Waters of the Commonwealth and in protection of the state's economic interests.

18. The Commonwealth also brings this action *in parens patriae* on behalf of its citizens whose economic welfare and general well-being, rights to due process, and equal protection are threatened by Defendants' actions.

³ This document superseded and replaced EPA's April 1, 2010 document entitled "Detailed Guidance: Improving EPA Review of Appalachian Surface Coal Mining Operations Under the Clean Water Act, National Environmental Policy Act and the Environmental Justice Executive Order" (hereinafter, "Interim Detailed Guidance" *See* attached hereto as Exhibit 3) which was the subject of the original Complaint in Intervention filed in this action.

II. JURISDICTION AND VENUE

19. This action arises under the Federal Water Pollution Control Act (“Clean Water Act” or “CWA”), 33 U.S.C.A. §§ 1251-1387, CWA §§ 201- 607, and the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et. seq.*, and 701 - 706.

20. The Court has jurisdiction of this Complaint based on a federal question, pursuant to 28 USC §§ 1331 and 1346(a)(2). Jurisdiction in this matter is conferred under 5 U.S.C. § 702 of the APA and under 28 U.S.C. §§ 2201 and 2202 for the purposes of granting the declaratory and injunctive relief sought herein.

21. Venue is proper because, pursuant to previous order, this case has been consolidated with the other above-styled cases. (Doc # 45)

III. THE ADMINISTRATIVE PROCEDURES ACT

22. Under the APA, a party “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.” 5 U.S.C. § 702. Parties may bring suit “in a court of the United States seeking relief other than monetary damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.” *Id.*

23. The APA allows a court to set aside agency actions that are “arbitrary, capricious, abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). An agency acts in a manner that is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law when it violates federal statutes, such as the CWA.

24. Section 553 of the APA establishes notice and comment procedures for federal rulemaking. *See* 5 U.S.C. § 553. This procedure ensures that the public receives notice of proposed agency rules or amendments and allows the public or other interested parties “an opportunity to participate in the rule making through submission of written data, views or arguments” *Id.* § 553(c).

25. When agencies make substantive revisions to applicable regulations without following formal APA-rulemaking procedures, they violate the APA.

IV. THE PARTIES

26. The Kentucky Energy and Environment Cabinet is an executive agency of the Commonwealth of Kentucky, with its central offices located in Frankfort, Kentucky.

27. The Cabinet is specifically authorized by KRS 224.16-050 to issue federal permits pursuant to 33 U.S.C. § 1342(b) of the Federal Water Pollution Control Act, subject to the conditions set out in the Clean Water Act, §§ 33 U.S.C. §§ 1342(b) and 1342(d).

28. The initial Plaintiff in this action, Kentucky Coal Association (“KCA”), based on information and belief, is a trade association representing the interests of the coal mining industry and related businesses throughout the Commonwealth of Kentucky.

29. Defendant, EPA is a federal agency charged with administration and enforcement of many of the federal environmental laws, including the Clean Water Act. EPA’s principal place of business and its headquarters is in Washington, DC.

30. Defendant, Lisa Jackson, sued herein in her official capacity as the Administrator of EPA, has ultimate authority and responsibility for the acts of the EPA. Her principal place of business is at EPA’s headquarters in Washington, DC.

V. STANDING

31. The Commonwealth of Kentucky has standing to bring this action on the grounds that Defendants' actions in unlawfully objecting to the Cabinet's NPDES permits have caused the Commonwealth to suffer a concrete and particularized injury, by preventing the exercise of its rights provided by the Clean Water Act to prevent, reduce, and eliminate pollution and to plan the development and use of the Commonwealth's water resources and to consult with the Administrator in the exercise of her authority under the Clean Water Act.

32. The Commonwealth has suffered actual harm in that Defendants' actions have prevented the Commonwealth from implementing its right under the Clean Water Act to protect water quality within its borders and to assess the health of its waters, and by denying the Commonwealth's due process right to comment on and otherwise participate in rulemaking by federal administrative agencies, as required by federal law.

33. That the injury to the Commonwealth is a direct result of Defendants' actions in imposing a rule on the issuance of NPDES permits by the Commonwealth that has not been lawfully promulgated through the notice and comment procedures required by federal law.

34. That a decision in the Commonwealth's favor enjoining Defendants' use of the Final Detailed Guidance to object to Kentucky's NPDES permits will make such objections less likely, and thus the Commonwealth will be able to exercise the authority granted it by the Clean Water Act to apply its promulgated water quality standards to such permits.

35. The Commonwealth also has standing *in parens patriae* to bring this action on behalf of its citizens who will suffer grave harm due to Defendants' actions in objecting to state NPDES permits without regard to state law and without the notice and comment required by federal law.

36. Defendants' wrongful actions will have a grave and detrimental effect on the welfare of Kentucky citizens who rely on the economic stability provided by the wages and taxes paid by the coal mining industry and ancillary businesses, including those citizens residing in the Appalachian region of Eastern Kentucky. EPA's implementation of its Final Detailed Guidance to delay and object to KPDES permits on the basis of an unpromulgated rule serves to disadvantage Kentucky coal mining operations and the citizens of the Commonwealth relative to non-Appalachian coal states. Such disadvantage will have a profound effect on Kentucky's economy and its citizens. Defendants' actions also have denied Kentucky's citizens the rights to notice of, and opportunity to comment on, EPA proposed rulemaking.

37. A decision in the Commonwealth's favor enjoining Defendants' use of the Final Detailed Guidance to object to Kentucky's NPDES permits will make such objections less likely, and enable the Commonwealth to issue NPDES permits and so preclude the detrimental economic impact on Kentucky's citizens threatened by Defendants' actions.

VI. THE CLEAN WATER ACT AND KENTUCKY LAW

38. Pursuant to Kentucky Revised Statutes ("KRS") 224.10-100 and in addition to all other powers and duties vested in the Cabinet, the Cabinet has the authority, power, and duty to:

Develop and conduct a comprehensive program for the management of water, land, and air resources to assure their protection and balance utilization consistent with the environmental policy of the Commonwealth;

Provide for the prevention, abatement, and control of all water, land, and air pollution...;

Provide for the control and regulation of surface coal mining and reclamation in a manner to accomplish the purposes of KRS Chapter 350 (State Surface Mining Regulation and Control Act)

Appear and participate in proceedings before any federal regulatory agency involving or effecting the purposes of the Cabinet; and

Issue, continue in effect, revoke, modify, suspend, or deny under such conditions as the Cabinet may prescribe and require that applications be accompanied by plans, specifications, and other information that the cabinet deems necessary for:

Permits to discharge into any waters of the Commonwealth.

39. KRS 224.70-100 identifies the Commonwealth's policy and purpose regarding water quality:

(1) It is hereby declared to be the policy of this Commonwealth to conserve the waters of the Commonwealth for public water supplies, for the propagation of fish and aquatic life, for fowl, animal wildlife and arboreous growth, and for agricultural, industrial, recreational, and other legitimate uses; to provide a comprehensive program in the public interest for the prevention, abatement and control of pollution; to provide effective means for the execution and enforcement of such program; and to provide for cooperation with agencies of other states or of the federal government in carrying out these objectives.

(2) The following are among the purposes of KRS Chapter 224: to safeguard from pollution the uncontaminated waters of the Commonwealth; to prevent the creation of any new pollution of the waters of the Commonwealth; and to abate any existing pollution.

40. To implement this policy and in the public interest, the Kentucky Legislature has established a comprehensive statutory and regulatory scheme pursuant to the Clean Water Act and its implementing regulations governing the permitting of wastewater discharges to the waters of the Commonwealth, including discharges from coal mining operations.

VII. EPA'S REVIEW OF SECTION 402 KPDES PERMITS PRIOR TO ISSUANCE OF THE INTERIM DETAILED GUIDANCE

41. The facts alleged in the Amended Complaint for Declaratory and Injunctive Relief initiating this action and filed on behalf of the Kentucky Coal Association are incorporated herein by reference.

42. On or about February 14, 2008, EPA and the Commonwealth of Kentucky, entered into a Memorandum of Agreement relating to Kentucky's administration of the Section 402 NPDES permitting program. The MOA specifically recognizes that "[t]he Cabinet has the primary responsibility to establish the State NPDES program priorities" and the Cabinet is charged with "ensur[ing] that the conditions of a draft permit are written in compliance with the applicable water quality standards of all affected states..." See, Exhibit 1, *infra*.

43. The MOA sets forth the process by which a draft Section 402 KPDES permit is submitted for review to EPA and issued by the Cabinet, and the time periods which govern the process. EPA may submit comments to a draft permit, or object to its issuance. If EPA only comments on the permit, the Cabinet can proceed to issue it. In the event EPA files an objection to a permit it shall include the specific grounds for the objection, including "the reasons for the objection, and the sections of the CWA or regulations which support the objection, and the actions which must be taken to eliminate the objection, including, if appropriate, the effluent limitations and conditions which the permit would include if it were issued by the Regional Administrator. The EPA objection must be based upon one or more of the criteria identified in 40 C.F.R. § 123.44(c)." If EPA objects to the permit, the state may not issue the permit. The state may request a hearing, but if it does not do so or otherwise appropriately respond to the objection within the required deadlines, exclusive authority to issue the permit passes to EPA. 40 C.F.R. § 123.44(h)(3).

44. In early 2009, the Kentucky Department for Environmental Protection, Division of Water ("KDOW"), the specific division within the Cabinet charged with review, issuance or denial of Section 402 KPDES permits, issued a draft of the current version of the Coal General Permit.

45. Consistent with the MOA, on April 3, 2009, EPA wrote KDOW with comments about the draft General Permit, including its concern that “[r]ecent studies have shown that there is a direct correlation between stream impairment and discharge of TDS/SC due to coal mining and coal processing,” citing a 2008 study⁴, and requesting that the General Permit be revised to include additional data submission and monitoring requirements for specific conductance (SC) and total dissolved solids (TDS) that would enable KDOW to determine whether surface coal mine operators subject to coverage under the General Permit may cause or contribute to violations of Kentucky’s water quality standards. EPA asked KDOW to withdraw the draft General Permit and to develop a new one, with input from EPA, “that would be consistent with the requirements of the Clean Water Act.” (See April 3, 2009 Letter, attached hereto as Exhibit 4).

46. KDOW did revise the General Permit to address the concerns raised in EPA’s April 3, 2009 letter, adding several new requirements, including effluent and in-stream chemical monitoring and in-stream biological monitoring. On May 15, 2009, KDOW sent EPA the revised proposed General Permit.

47. On or about June 16, 2009, and within thirty (30) days of its receipt of the revised General Permit, EPA sent a letter to KDOW which stated “[i]n accordance with the EPA/Commonwealth of Kentucky NPDES MOA, we have completed our review of the above draft permit and have no objections to the proposed permit conditions. The draft permit satisfies EPA’s concerns that were discussed in our April 3, 2009 letter to KDOW.” (See June 16, 2009 Letter, attached hereto as Exhibit 5). KDOW issued the final General Permit following its receipt of this June 16, 2009 letter from EPA voicing no objections to its issuance.

⁴ Pond, G.J., M.E. Passmore, F.A. Borsuk, L. Reynolds, and C.J. Rose. 2008. Downstream effects of mountaintop coal mining: comparing biological conditions using family-and genus level macroinvertebrate bioassessment tools. *J.N. Am. Benthol. Soc.* 27(3):717-737 (the “Pond-Passmore study”).

48. In late 2009, and early 2010, and in the context of numerous discussions with EPA, KDOW also proposed to issue numerous Section 402 KPDES individual permits (“Individual Permits”) for coal mining activities in Kentucky. Like the Coal General Permit, these permits included requirements for effluent and in-stream chemical monitoring and in-stream biological monitoring, as well as whole effluent toxicity (WET) testing. The Cabinet did not have sufficient data regarding conductivity and dissolved solids from the new or expanded sources with which to conduct an RPA for these pollutants. However, the permits provided that the RPA would be conducted after issuance of the permit based on the actual, site-specific data generated from the permitted site. Each permit also included a re-opener clause allowing KDOW to impose new permit conditions, including numerical effluent limits, upon the receipt of new data and completion of a RPA.

49. KDOW’s approach – conducting the RPA from site-specific data generated from a new or expanded discharge after issuance of the permit, along with inclusion of a permit reopener for the potential future imposition of effluent limits - is fully consistent with EPA’s recommendations to state permitting authorities in its *Technical Support Document for Water Quality-Based Toxics Control*, applied since it was issued by EPA in 1991, and with Kentucky’s “Permitting Procedures for Determining “Reasonable Potential””, May 1, 2000 which were approved by EPA on July 7, 2000. *See, Exhibit 6, infra*)

50. In fact, KDOW’s approach was submitted to EPA as part of a set of developed procedures for conducting RPAs in Kentucky, and these procedures were specifically approved by EPA for use in KPDES Section 402 permits on or about May 1, 2000. (*See Exhibit 6, infra*). Those procedures made clear that when insufficient data exists to make a determination as to the ‘reasonable potential’ of the discharge to violate water quality standards, Kentucky has the

option to require 'monitor only' or a quarterly monitor and report requirement as an interim measure to provide for collection and evaluation of data prior to determination of an appropriate effluent limit. (*Id.*; *see also* Affidavit of R. Bruce Scott, attached as Exhibit 7).

51. EPA did not object to the pending Section 402 KPDES Individual Permits, which would have prevented their issuance. Instead, from December 21, 2009 through March 18, 2010, EPA sent comment letters to KDOW with recommendations on the numerous Section 402 KPDES Individual Permits. In those comments, EPA asserted that there was a reasonable potential that discharges from surface mining activities will cause or contribute to an excursion of Kentucky's narrative water quality standard for conductivity, citing the Pond-Passmore Study; and recommending that an RPA for specific conductance and total dissolved solids be conducted and that water quality-based effluent limitations also be included in the permit.

52. KDOW responded to EPA's comments by indicating that the permits contained requirements for the collection of necessary site-specific data to perform the RPAs, along with permit reopeners to add numeric water quality effluent limits as necessary. (*See e.g.*, March 19, 2010 Letter to EPA, attached hereto as Exhibit 8).

53. On March 19, 2010, KDOW issued the numerous Section 402 KPDES Individual Permits for coal mining facilities without objection by EPA. By not objecting to these permits, EPA acknowledged that they complied with CWA requirements.

54. Thus, prior to EPA promulgation of the Interim Detailed Guidance on April 1, 2010, EPA did not object to the Section 402 KPDES General Permit or Individual Permits, none of which provided numerical effluent limits as a method of implementing Kentucky's narrative water quality standards for conductivity or toxicity. Nor did the Section 402 KPDES

Individual Permits provide for conducting an RPA for conductivity, total dissolved solids or sulfates at the time of permit issuance, but instead provided for a post-permit RPA using site-specific data, and a permit re-opener clause.

55. In fact, as stated above, EPA had never objected to issuance of a Section 402 KPDES permit for coal mining activities in Kentucky since Kentucky gained permit issuing authority in 1983. EPA's oversight of Section 402 KPDES permits changed, markedly, after EPA issued its Interim Detailed Guidance on April 1, 2010.

VIII. EPA'S REVIEW OF SECTION 402 KPDES PERMITS AFTER ISSUANCE OF THE INTERIM DETAILED GUIDANCE

56. The facts alleged in the Amended Complaint for Declaratory and Injunctive Relief initiating this action and filed on behalf of the Kentucky Coal Association is incorporated herein by reference.

57. On April 1, 2010, EPA released its Detailed Guidance to EPA Regions 3, 4 (which includes Kentucky) and 5 for their review of Appalachian coal mining activities, including their review of Section 402 NPDES permits issued by states. Concurrent with its release, EPA published the Detailed Guidance in the Federal Register for public comment. 75 Fed. Reg. 18500. EPA characterized the document as "final interim guidance" and announced that it would issue final guidance after receipt of public comments and the results of an external peer review by the Science Advisory Board. It further asserted that it is "not a regulation" and "does not impose legally binding requirements on EPA."

58. Such disclaimers are inconsistent, however, with EPA Director Jackson's public pronouncements at the time of the issuance of the Detailed Guidance that "no, or very few valley fill ... are going to meet this standard." It is also inconsistent with the language of the

Detailed Guidance as a whole, which is replete with pronouncements on what regional administrators should do in the course of reviewing Section 402 NPDES permits, including a recommendation to object to those permits if they do not contain the specific limitations contained in the Detailed Guidance. This document states on its face that it would serve in “clarifying EPA’s expectations” and that it is “effective immediately” and that EPA expected Regions 3, 4 and 5 to “begin using this interim final guidance immediately in your review of Appalachian surface coal mining activities.” (*Id.* at 1-2.) In fact, EPA’s national office has not granted the relevant Regional Offices discretion on the use of the Detailed Guidance. Upon information and belief, Region 4 has been instructed by its national headquarters to delay or otherwise obstruct the issuance of any Section 402 KPDES permit for surface coal mining facilities in Eastern Kentucky submitted by KDOW to EPA for review after April 1, 2010 that does not incorporate the provisions of the Interim Detailed Guidance or, after July 21, 2011, the Final Guidance .

59. In particular, the Interim Detailed Guidance asserts that state Section 402 NPDES permits it had reviewed “did not incorporate provisions that would implement the relevant narrative water quality standards relating to discharges that increase the levels of conductivity, total dissolved solids and sulfates.” EPA found state permits to be deficient in two principal ways: (a) the state permitting authority had not conducted a sufficient RPA at the time of permit issuance; and (b) even in the absence of an RPA, “available science” supplied a sufficient causal link for state permitting authorities to determine that coal mining discharges which increase conductivity, dissolved solids or sulfates would likely violate narrative water quality standards” and thus EPA concludes in the Interim Detailed Guidance that such permits should have contained effluent limits for these pollutants. (*Id.* at 8).

60. While post-permit RPAs coupled with a permit re-open clauses has long been sanctioned by EPA (as evidenced by its own *Technical Support Document* and its decision not to object to KDOW's March 19, 2010 issuance of numerous Section 402 KPDES Individual Permits), the Interim Detailed Guidance states that "permitting authority should require the applicant to characterize the anticipated pollutant concentrations and loads using data from similar discharges and/or based on characteristics of local soils and geology " including from adjacent mine sites or from ambient data collected as part of the Section 404 or state Surface Mining Control and Reclamation Act permit applications, and if none is available, that permitting authorities should collect the data themselves or could reject the application. (*Id.* at 9). A post-permit RPA with a permit reopener is not included among the options listed in the Interim Detailed Guidance as available to permitting authorities for addressing RPAs for new or expanded discharges. In sum, the Interim Detailed Guidance concludes that "in general, an NPDES permit that fails to show evidence of a parameter-specific reasonable potential analysis will be inconsistent with the requirements of the CWA." (*Id.* at 8).

61. The Interim Detailed Guidance also criticizes state permitting authorities for not incorporating provisions that would implement state narrative water quality standards, particularly relating to discharges that increase conductivity, total dissolved solids and sulfates. Specifically, EPA contends in the Interim Detailed Guidance that "scientific literature" should be considered relevant information in implementing narrative water quality standards, and that two such scientific reports – specifically the 2008 Pond-Passmore Study and a draft report by EPA titled *A Field-Based Aquatic Life Benchmark for Conductivity in Central Appalachian Streams* ("the Draft Study") – have linked conductivity levels in streams below surface coal mining operations and adverse impacts to aquatic life in

those streams. (*Id.* at 5-6, 11). According to EPA, these studies demonstrate that “conductivity impacts of projects with predicted conductivity levels below 300 $\mu\text{S}/\text{cm}$ generally will not cause a water quality standard violation and that in-stream conductivity levels above 500 $\mu\text{S}/\text{cm}$ are likely to be associated with adverse impacts that may rise to the level of exceedances of narrative water quality standards.” (*Id.* at 12). The Interim Detailed Guidance further directs Regions 3, 4 and 5 to work with state permitting authorities to “ensure that the permit includes conditions that protect against conductivity levels exceeding 500 $\mu\text{S}/\text{cm}$.” (*Id.*). It even directs regional offices to “object to issuance of [a] proposed permit” if it fails to comply with the CWA “as noted” in the Interim Detailed Guidance (*Id.* at 8).

62. In essence, the Interim Detailed Guidance establishes a presumption that any discharge which exceeds the 500 $\mu\text{S}/\text{cm}$ conductivity level is violative of state narrative water quality standard for conductivity, including Kentucky’s narrative water quality standard; and that effluent limits should thus be established for this pollutant. EPA further concludes in the Interim Detailed Guidance that most such effluent limits should be numerical, and that it is in only the most “limited cases” where it will be infeasible to establish a numerical effluent limit to implement a narrative water quality standard. That EPA seeks to establish numerical effluent limits relating to conductivity (and other pollutants) is clear on the face of the Interim Detailed Guidance, which notes that “[e]stablishing enforceable numeric limits for conductivity, selenium and other parameters in state Section 402 permits will help to improve water quality and better protect public health and aquatic life in streams downstream from Appalachian surface coal mining operations.” (*Id.* at 7).

63. On April 2, 2010, James D. Giattina, Director of EPA Region 4’s Water Protection Division, sent an e-mail to KDOW, attaching a copy of a letter, also dated April 2nd.

(See April 2, 2010 Giattina E-mail and Letter, attached hereto collectively as Exhibit 9). In the e-mail, Director Giattina referenced the Section 402 KPDES Individual Permits recently issued by KDOW without objection by EPA, and noted that EPA “will not be requesting further review of these permits” but would be “working with you to fully address our concerns under our regs for future permits.”

64. In the accompanying letter, EPA stated that the new permit requirements imposed by KDOW in the recently issued permits had not addressed all of EPA’s concerns. Despite having failed to object to these permits just weeks before, it now characterized their contents -- increased effluent monitoring, WET testing, post-permit RPAs coupled with permit reopeners-- as deficient. Of particular concern, according to EPA, was “the missing reasonable potential analyses associated with narrative water quality standards and appropriate numeric effluent limits associated with these standards, including but not limited to conductivity and total dissolved solids.”

65. EPA specifically noted in this April 2, 2010 letter that it (the Region 4 office) had now received the Interim Detailed Guidance document from its national office, and that “the issues that we raised in our recent comment letters are based on existing regulatory requirements and are consistent with this guidance”; that it would “provide the framework that will assist states in drafting Appalachian coal mining NPDES permits” and that reviews of “future draft NPDES permits for coal mining will continue to emphasize the need for DOW to interpret narrative water quality standards (including but not limited to conductivity and total dissolved solids) to conduct reasonable potential analyses associated with narrative water quality standards, and to include appropriate numeric effluent limits associated with those standards.” (*Id.*).

66. EPA's use of the Interim Detailed Guidance as a legislative-type rule was almost immediate. For example, on April 8, 2010 EPA sent a formal notice of objection to coverage under the general permit for a Kentucky surface coal mine operator, citing the fact that the general permit "does not include a reasonable potential analysis or an effluent limit for specific conductivity." (See April 8, 2010 Letter, attached hereto as Exhibit 10).

67. From April 1 to October 1, 2010, KDOW posted 56 additional Section 402 KPDES Individual Permits for public notice and comment. The permits which EPA did not object to after April 1, 2010, and which they allowed to be issued, were for underground mines, preparation plants or surface mines in Western Kentucky – none of which are subject to the Interim Detailed Guidance. In contrast, EPA objected to all 21 of the proposed Section 402 KPDES Individual Permits for new or expanded surface coal mines in Eastern Kentucky (all of which were covered by the Interim Detailed Guidance), thus blocking their issuance and the proposed mining. According to EPA, its "objections relate to KDOW's failure to conduct an adequate reasonable potential analysis (RPA), in accordance with 40 CFR § 122.44(d), to determine whether the proposed discharge will cause, have the reasonable potential to cause, or contribute to a violation of state water quality standards (WQS), and KDOW's failure to include in the permit effluent limits necessary to ensure that the proposed discharge will not cause or contribute to a violation of WQS, as required by the CWA §301(b), 40 CFR § 122.44((A) and (d), and 40 CFR 122.44(d)(1)." EPA also asserted in its objection letters to the 21 permits that its objections "consider...the emerging science regarding the impacts of coal mining on water quality" citing the Pond-Passmore Study and the Draft Report. (See Objection Letters for the 21 Permits, attached hereto collectively as Exhibit 11).

68. Specifically, EPA objected to the aforementioned 21 post-April 1, 2010 permits because it concluded that KDOW had not conducted an adequate RPA for certain pollutants, including conductivity (SC), total dissolved solids (TDS) and sulfates. (See Exhibit 11, *infra*, Objection letter, at p. 3-4). EPA noted that where site-specific data is unavailable (such as for the new or expanded discharges involved here), KDOW can obtain data for these RPAs from adjacent mining facilities or from the ambient data collected as part of the Section 404 or SMCRA permit applications; independently gather the data; or reject the application: the very same directives included in the Interim Detailed Guidance. (See Exhibit 3, Interim Detailed Guidance at 9). EPA specifically rejected KDOW's longtime EPA approved approach of conducting post-permit RPAs for new or expanded facilities using site-specific data (an approach it did not object to in the weeks immediately preceding issuance of the Interim Guidance) as "inconsistent with the CWA" because of "existing information regarding the relationship between the coal mining discharges and water quality impairments, together with available information regarding the effluent and receiving streams." (See Exhibit 11, Objection letter, at p. 4, n. 5).

69. EPA also objected to these permits because they failed to include numerical effluent limits to implement Kentucky's narrative water quality standards. According to EPA, KDOW must submit a revised permit which includes effluent limits for any pollutant for which there is a reasonable potential for the discharge to cause or contribute to an excursion above a water quality standard. (*Id.* at 6). In the Interim Detailed Guidance, EPA concluded that "the available science will demonstrate that there is a reasonable likelihood" that discharges involving conductivity levels above 500 $\mu\text{S}/\text{cm}$ will violate state water quality standards, irrespective of the RPA's findings. (See, Exhibit 3, Interim Detailed Guidance at pp.

8, 11-12). EPA's objection to the 11 permits is thus based, in part, on the failure of KDOW to include numerical effluent limits on conductivity as a condition of the permit.

70. While the 21 individual objection letters (those found at Exhibit 11) did not specifically cite by name the Section 402 NPDES program changes mandated by the Interim Detailed Guidance, EPA's Region 4 used the Interim Detailed Guidance – its scientific conclusions, presumptions and directives – in responding to KDOW and objecting to the 21 Section 402 KPDES Individual Permits in September and October 2010.

71. That EPA relied upon the Interim Detailed Guidance in objecting to these KPDES permits is clear when comparing the directives of the Interim Detailed Guidance and the objections themselves to the EPA's actions prior to April 1, 2001 when the guidance was unveiled. The Interim Detailed Guidance directs its regional offices that there is sufficient scientific evidence for them to presume that conductivity levels exceeding 500 $\mu\text{S}/\text{cm}$ will have a reasonable likelihood to violate state water quality standards and that high levels of conductivity, total dissolved solids and sulfates have a reasonable likelihood to damage aquatic life. It directs EPA Regional Offices that, because of these presumptions, states should be performing RPAs for new surface mine facilities at the time of permit issuance using existing data from adjacent mine sites, or failing that, they should reject the application. It also directs Regional Offices that the scientific studies linking high conductivity with impairment of aquatic life themselves should be sufficient to require the states to impose numerical effluent limits for this pollutant. (*See*, Exhibit 3, Interim Detailed Guidance, pp. 7-12). EPA's objections to the 21 Section 402 KPDES permits incorporates these Interim Detailed Guidance directives.

72. EPA's reliance upon the Interim Detailed Guidance for its post-April 1, 2010 objection to Section 402 KPDES permits is also clear when comparing it to EPA's actions prior

to April 1st. EPA did not object to the Section 402 KPDES Individual Permits issued two weeks before publication of the Interim Detailed Guidance. After publication of the Interim Detailed Guidance, and Final Detailed Guidance EPA found permits containing the identical permit conditions inconsistent with the CWA. Clearly, EPA's abrupt program changes stem from the Interim Detailed Guidance and Final Detailed Guidance.

IX. KENTUCKY'S FUTILE EFFORTS TO RESOLVE ISSUES WITH EPA

73. The facts alleged in the Amended Complaint for Declaratory and Injunctive Relief initiating this action and filed on behalf of the Kentucky Coal Association is incorporated herein by reference.

74. That EPA Headquarters intended to prevent the issuance of any Section 402 KPDES Individual Permits for new or expanded surface coal mines in Eastern Kentucky after April 1, 2010 unless they strictly comply with the directives of the Interim Detailed Guidance, and its field offices have no discretion to deviate from this position, is amply demonstrated by Kentucky's ultimately futile attempt to reach agreement with EPA Region 4 regarding the aforementioned 21 pending Section 402 KPDES Individual Permit objections.

75. In December 2010, Kentucky reached out to EPA and were assured by EPA Region 4 that EPA Headquarters would support a negotiated agreement between Kentucky and EPA Region 4 officials to resolve the permit dispute and allow the 21 permits to be issued.

76. On or about January 10, 2011, the Cabinet provided EPA Region 4 with a series of options to be considered for purposes of resolving the Kentucky Section 402 permit dispute. (See Scott Affidavit; see also January 10, 2011 e-mail, attached as Exhibit 12). A spreadsheet list

of options was prepared and sent to EPA on January 12, 2011. It is attached as Exhibit 13 with an accompanying email which states:

“**1. Option 1** tab would represent KY’s primary template for the permitting of coal mining operations under the CWA 402 program. This would involve an approach using:

- a. An RPA up front in the drafting of the permit, and
- b. Imposition of a combination of WET, instream biological analysis, narrative standard, and adaptive BMP with biological trigger for purposes of implementing the narrative water quality standard for conductivity.

2. Option 2 tab would represent an option that a coal mining operating might accept of their own choosing in lieu of Option 1. This would involve:

- a. RPA up front in the drafting of the permit, and
- b. Imposition of a numeric interpretation of the narrative water quality standard directly as a permit limit for conductivity (or other appropriate chemical specific parameter if available and sufficient, such as sulfate) along with the possibility of a compliance schedule for purposes of implementing the narrative water quality standard for conductivity. There would also be a standard BMP plan requirement. This could be done at the applicant’s request in lieu of WET, instream biological analysis, the narrative standard, and a BMP plan with a biological trigger built in.”

77. In late 2010, Kentucky officials traveled to Atlanta to meet with EPA Region 4 officials, after which EPA Region 4 officials traveled to Kentucky. Lengthy meetings were conducted between the two in an effort to resolve the pending permit objections. Ultimately, a revised Section 402 KPDES permit template was drafted to address all of EPA’s various objections. (*See Scott Affidavit*).

78. On March 4, 2011, Kentucky received a phone call from EPA Region 4 indicating they were in agreement with Kentucky’s revised approach. On March 10, 2011, Kentucky

received an email from EPA Region 4 identifying some last minute revisions they wanted to provide final clarity to the resolution and asked for Kentucky to send the final revised CWA 402 permit template. (*See Scott Affidavit*). The e-mail is attached as Exhibit 14.

79. On April 1, 2011 Kentucky sent to EPA Region 4 for final review and acceptance its revised permit template, in response to EPA follow-up comments. This was the third such attempt. It is attached as Exhibit 15. Kentucky received a phone call from EPA Region 4 staff late Friday, April 1, 2011, that EPA had accepted Kentucky's revised approach to resolve the pending permit objections. (*See Scott Affidavit*).

80. On April 11, 2011, however, Kentucky received another phone call from EPA Region 4 indicating that some reservations were now being expressed at EPA Headquarters on the revised permit template. (*See Scott Affidavit*).

81. On May 4, 2011, EPA Region 4 officials traveled to Kentucky to meet with Cabinet officials. At the meeting, EPA did not seek to continue ongoing settlement discussions or to negotiate any potential changes to the revised permit template to which EPA Region 4 had already agreed. Instead, EPA Region 4 officials' only message during the May 4th meeting was that the revised permit template approach had been rejected by EPA headquarters and there was no settlement. This was contrary to what EPA Region 4 had represented to the Cabinet on two prior occasions. (*See Scott Affidavit*).

82. Clearly, EPA Region 4 was overruled by EPA Headquarters when it attempted to utilize its discretion in oversight of Section 402 KPDES Individual Permits and agree to a permit approach which did not mandate both a pre-permit RPA and numerical effluent limits on conductivity for every surface coal mine in Eastern Kentucky. EPA Region 4 in fact has no discretion on this issue and was prevented from approving any Section 402 KPDES Individual

Permits for new and expanded surface coal mines in Eastern Kentucky that did not contain certain restrictions mandated by the Interim Detailed Guidance, namely a pre-permit RPA *and* numerical effluent limits on conductivity.

83. EPA still has taken no action on the 21 Section 402 KPDES Individual Permits which EPA objected to in September and October 2010. Pursuant to the MOA between the Cabinet and EPA, if KDOW requests a hearing to contest an objection lodged by EPA to a KPDES Section 402 Individual Permit, then EPA must schedule a hearing (see also 40 CFR §123.44). Certainly, KDOW and the involved coal operators expected and deserved a prompt hearing and a means to contest EPA's objection within a reasonable time. However, it has been nearly one (1) year since EPA sent its objections to the 21 KPDES Section 402 Individual Permits. KDOW requested a hearing on each such permit objection, yet EPA has taken no steps to convene the required hearings.

84. Bowed by the never ending delay, a few of the coal operators involved with the aforementioned 21 Section 402 KPDES Individual Permit objections eventually withdrew their applications. Others have reduced the size of their projects so they could qualify for permit coverage under Kentucky's General Permit. However, at least 14 of the 21 Section 402 KPDES Individual Permits remain in limbo, without any means to resolve their differences with EPA.

85. EPA's actions in delaying and preventing the issuance of any Section 402 KPDES Individual Permits for new surface mines in Eastern Kentucky based on the flawed and illegal Interim Detailed Guidance, coupled with its failure to conduct the mandated hearings on its permit objections, has caused, and will continue to cause, damage to Eastern Kentucky's economy.

X. ISSUANCE OF THE FINAL GUIDANCE AND EPA'S CONTINUED REJECTION OF EASTERN KENTUCKY SECTION 402 PERMITS

86. The facts alleged in the Amended Complaint for Declaratory and Injunctive Relief initiating this action

87. On or about July 21, 2011, and after public notice and comment, EPA issued its Final Detailed Guidance. (See Exhibit 2, Final Detailed Guidance) Like its predecessor (the Interim Detailed Guidance), it is replete with disclaimers about its binding effect, including that the Final Detailed Guidance “does not impose legally binding requirements and will not be implemented as binding in practice.” (*Id.* at p. 1). Despite the benefit of public notice and comment, the Final Detailed Guidance differs little from the Interim Detailed Guidance. While it boasts of prompt action on permits; its tone is conciliatory; and its wording suggests a more flexible and collaborative approach, a close and thorough review of the language of the Final Detailed Guidance, and EPA’s subsequent use of it in objecting to additional KPDES Section 402 Individual Permits for surface mines in Eastern Kentucky, belie EPA’s characterization of the Final Detailed Guidance as advisory and non-binding. In truth, EPA’s Final Guidance is simply a continuation of EPA policy changes first announced in the Interim Detailed Guidance and effective since April 1, 2010 and which have led to what is basically an EPA moratorium on Section 402 KPDES permits for new and expanded surface coal mines in Eastern Kentucky that do not contain the permit limitations and WQBELs EPA demands.

88. For example, the Final Detailed Guidance continues EPA’s focus on the CWA’s “reasonable potential analysis” or RPA requirement. According to the Final Detailed Guidance:

“To ensure that limitations are as stringent as necessary to meet water quality standards, consistent with 40 C.F.R. § 122.44(d)(1), permitting authorities should not defer reasonable potential analyses until after permit issuance. Under the CWA and its implementing regulations, an NPDES permit must contain limits as stringent as necessary to meet applicable water quality standards. CWA §

301(b)(1)(C); 40 C.F.R. § 122.44(d)(1). EPA recommends that the administrative record for a permit include evidence of a parameter-specific reasonable potential analysis in order to ensure compliance with these provisions.”

(See Exhibit 2, Final Detailed Guidance at p. 14).

“For new (proposed) discharges, permitting authorities should use all valid and representative data. Section 3.2 of the TSD provides guidance to permit writers regarding how to conduct a reasonable potential analysis without effluent data. For surface coal mining operations, pre-issuance reasonable potential analysis should be conducted using data secured through evaluation of similarly situated facilities in adjacent watersheds or similar mining practices in the same ecological or geological setting.”

(*Id.* at p. 15).

In essence, in the Final Detailed Guidance EPA is instructing its Regional offices that the CWA requires that an RPA be conducted before a permit is issued, and that for new surface coal mines, the state permitting authority should utilize either data from “adjacent watersheds” to conduct this pre-permit RPA or, it can utilize “best available science” (i.e., the Pond-Passmore study and its progeny and the conductivity presumption) to establish “reasonable potential to violate state water quality standards”). The Final Detailed Guidance neither contains any caveat or exceptions to this directive, nor does it grant EPA Regional offices any discretion to approve permits for new surface mines on a case-by-case basis which provide for an RPA after issuance of a Section 402 KPDES Individual Permit. It is thus a mandatory, binding rule.

89. The Final Detailed Guidance also continues to mandate numerical conductivity limits for surface coal mines in Eastern Kentucky. It directs state permitting authorities that they must establish a WQBEL once they determine that there is a “reasonable potential” that the discharge will violate state water quality standards – which EPA believes can be assumed from “best available science.” (See Exhibit 2, Final Detailed Guidance at p. 17.). While acknowledging that a WQBEL may be expressed in a narrative form “when it is infeasible to derive a numeric limit,” EPA goes on to state that “in many cases calculation of numeric effluent

limits for conductivity is feasible, in light of the extensive scientific evidence”. (*Id.*). It also “recommends” that a numerical effluent limit for conductivity be set at 300 $\mu\text{S}/\text{cm}$ and/or not outside the range of 300-500 $\mu\text{S}/\text{cm}$. EPA continually refers to this as its conductivity “benchmark”. (*Id.* at 18).

90. While EPA claims it paid heed to the Science Advisory Board’s admonition that data linking increased levels of conductivity from surface mines to injury to downstream aquatic life may be limited geographically and requires further validation outside the region the data was generated from, EPA only anticipates undertaking further validation of its conductivity benchmark “outside West Virginia and Kentucky” and the Final Detailed Guidance indicates EPA will continue to use the conductivity benchmark in ecoregions 68, 69 and 70.

91. While EPA states in the Final Detailed Guidance that permits are assessed on a case by case basis, and that a numerical effluent limit for conductivity above the benchmark or other “alternate scientifically defensible approaches” may be permissible in certain situations, EPA’s revised alternatives approach appears to be limited in applicability to permits for mining activities outside the ecogregions 68, 69 and 70 of West Virginia and Kentucky. Section 402 NPDES permits for new surface coal mines located within the West Virginia and Kentucky portions of ecoregions 68, 69 and 70 must include the conductivity benchmark or EPA will object to them. After all, EPA objected to the 21 Section 402 KPDES Individual Permits in 2010, in part because they did not incorporate numerical WQBELs for conductivity, total dissolved solids and sulfates. EPA Headquarters also refused to approve the Section 402 KPDES Individual Permit template negotiated and agreed upon between Kentucky and EPA Region 4, and this template, too, - while containing virtually every other EPA request including

requiring alternative approaches in EPA's Final Detailed Guidance - did not mandate numerical effluent limits on conductivity absent site-specific data justifying such limits.

92. EPA is also now utilizing the Final Detailed Guidance to object to Section 402 KPDES Individual Permits. As recently as July 1, 2011, KDOW posted 54 additional Section 402 KPDES Individual Permits for notice and comment. EPA commented on 35 of those permits, thus permitting them to be issued. However, all 35 were for either underground coal mining or for coal mining activities outside ecoregions 68, 69 and 70, or for coal preparation plants, and thus not subject to the Final Detailed Guidance. (*See* September 28, 2011 Letter from James D. Giattina to Sandy Gruzesky, attached as Exhibit 16).

93. However, EPA objected to the remaining 19 Section 402 KPDES Individual Permits – all of which were for new or expanded surface coal mines in Eastern Kentucky. (*See* Exhibit 17, September 28, 2011 Letter from James D. Giattina to Sandy Gruzesky). While the Final Detailed Guidance was not specifically mentioned, EPA objected to these permits for the same reasons the 21 Section 402 KPDES Individual Permits were objected to in 2010: because they failed to comply with the directives found in the Interim and now Final Detailed Guidance, namely (1) in each, KDOW proposed to “conduct the RPA during the permit term, and not prior to the authorization of the discharge” and EPA concluded this approach “is inconsistent with the CWA and its implementing regulations⁵.” (*See* Enclosure 1 to Exhibit 17, at p. 2); and (2) because they lacked numerical effluent limits for conductivity. Specifically, in its September 28, 2011 objection letter, EPA told KDOW that “additional effluent limits are necessary to ensure that discharges do not contribute to violations of WQS”; that this is demonstrated by “best

⁵ It should be noted that the pre-permit RPA requirement that EPA contends is mandated by the CWA was not an aspect of the 35 Section 402 KPDES Individual Permits that EPA permitted KDOW to issue in late September 2011 (those involving underground mining, for example), thus calling into question how a pre-permit RPA could in fact be a mandatory requirement of the CWA.

available science”; and that EPA would include in any permit it issued “effluent limits... to ensure that all discharges from these projects do not exceed a conductivity level of 300 μ S/cm” unless site specific data suggests that another WQBEL is justified. (*Id.* at p. 4).

94. While EPA contends - both in the Final Detailed Guidance and the September 28, 2011 objection letter – that it reviews permits on a case by case basis, EPA failed to send individual letters objecting to each permit. Instead EPA sent KDOW one letter containing its blanket objections for all 19 KDPEs Section 402 Individual Permits. The letter is full of examples where EPA refers to and criticizes “some” but not all of the draft permits for either a deficient fact sheet or not including sufficient data in its permit application. These objections are vague and not specific to any one applicant, and do not satisfy the MOA’s requirement that EPA make “specific objections” in order to prevent KDOW from issuing them. (*See* Enclosure 1 to Exhibit 17).

95. As discussed herein, EPA’s directive in the Final Guidance and its September 28, 2011 objection letter that “conducting the RPA during the permit term...does not comply with the CWA” is contrary to EPA’s long-established procedures. Since at least 1991, if not before, EPA has directed state permit writers that they can issue Section 402 permits for new discharges before conducting an RPA as long as the permit contains a reopener so that additional permit restrictions can be imposed upon the operator should the RPA generate site-specific data which demonstrates that the discharge does in fact contribute to an excursion which violates state water quality standards. In 2000, EPA even specifically approved Kentucky’s procedures for conducting RPAs, and those procedures included post-permit RPAs with permit reopeners.

96. EPA’s use of or reliance upon the Interim and now its Final Detailed Guidance in (i) establishing a benchmark presumption concerning the level of conductivity (SC) which EPA

believes is likely to violate Kentucky's narrative water quality standards; (ii) rejecting a post-permit RPA based on site-specific data (coupled with permit reopeners) for new or expanded surface coal mine facilities in Eastern Kentucky and instead requiring an RPA at the time of permit issuance using either presumptions from scientific papers or data from adjacent watersheds property (and thus non site-specific data); and/or (iii) compelling the Cabinet to establish numerical WQBELs for conductivity, is arbitrary and capricious.

97. Through first the Interim Detailed Guidance, and now the Final Detailed Guidance, EPA has and is attempting to either (i) establish a new water quality standard for conductivity on its own (which it cannot do absent notice and comment rulemaking pursuant to 33 U.S.C. § 1313(c)(4)) or (ii) halt the issuance of any Section 402 KPDES Individual Permit by KDOW to Kentucky surface coal mining operators until the state agrees to conduct pre-permit RPAs and to establish a new numerical water quality standard for conductivity which comports with the Interim and Final Guidance's presumption that conductivity levels which exceed the 300- 500 $\mu\text{S}/\text{cm}$ range will violate existing narrative water quality standards; or (iii) failing that, to wrest control over Section 402 KPDES permitting from the Cabinet/KDOW so as to eliminate surface coal mining as a method of resource extraction in Eastern Kentucky and other Appalachian states. This attempt to usurp proper state authority over Section 402 KPDES permits is arbitrary and capricious, and otherwise violates the CWA and the APA.

98. EPA's use of the Interim Detailed Guidance and now the Final Detailed Guidance to object to and block such permits has to date caused, and will in the future cause, grave harm to Kentucky's economy. It has prevented the issuance of any Section 402 KPDES Individual Permit for any new or expanded surface coal mine in Eastern Kentucky since April 1, 2010, and will continue to prevent issuance of such permits in the future. Without such permits, such coal

mining activity may not take place. EPA's moratorium on Section 402 KPDES Individual Permits for surface coal mines in Eastern Kentucky has resulted in lost coal production, revenue and employment for Kentucky. For example, the 19 Section 402 KPDES Individual Permits that EPA recently objected to were projected to create over 3800 new jobs in Eastern Kentucky. These new jobs are now in jeopardy due to EPA's actions described herein.

99. EPA's use of the Interim Detailed Guidance and Final Detailed Guidance has to date caused, and will in the future cause, indefinite delays in the Section 402 KPDES permitting process, and/or has prevented and will prevent issuance of such permits altogether, causing significant injury to the Commonwealth and its citizens due to loss of wages, business opportunities, and taxes, and overall economic chaos particularly in Kentucky's eastern Appalachian region.

100. Pursuant to 28 U.S.C. § 2201, there is an actual, justiciable controversy between the parties for which this Court has jurisdiction to declare the rights and legal relations of the parties. Plaintiff-Intervenor, Commonwealth of Kentucky respectfully requests that this Court declare that:

(i) The Interim and Final Detailed Guidance amounts to a legislative rule and EPA has violated 5 U.S.C. § 553 of the APA in failing to subject it to the procedural requirements of public notice and comment rulemaking; and/or

(ii) EPA's presumption in the Interim Detailed Guidance and Final Detailed Guidance that water conductivity exceeding 500 $\mu\text{S}/\text{cm}$ will likely cause an excursion which will violate state water quality standards (including Kentucky's narrative water quality standard for conductivity) amounts to adoption of a new water quality standard and

that the adoption of such a standard without public notice and comment rulemaking violates 33 U.S.C. §1313(c)(4) of the CWA; and/or

(iii) EPA's actions in adopting and using the Interim Detailed Guidance and then subsequent Final Detailed Guidance to usurp the rightful role of the Commonwealth to establish and police state water quality standards, and which has the effect of delaying or halting the issuance of Section 402 KPDES permits for surface coal mining facilities in Eastern Kentucky, is arbitrary and capricious, violates 5 U.S.C. §706(2) of the APA and should be set aside.

101. The Commonwealth of Kentucky as a delegated state under the CWA is primarily responsible for setting and interpreting water quality standards, for administering the NPDES program in the Commonwealth, and to monitor and protect the quality of the State's streams and the aquatic ecosystems therein; the reliance by EPA on the Interim Detailed Guidance and subsequent Final Detailed Guidance to unilaterally change Kentucky's ability to administer its delegated program is arbitrary and capricious and otherwise violative of the Fifth Amendment guarantee of due process.

102. EPA's actions violate the 10th Amendment guarantee of the right of the states and the people to be free from the improper exercise of federal power.

103. The Interim Detailed Guidance and subsequent Final Detailed Guidance issued by EPA unilaterally changes rules for NPDES permits without the proper public notice and comment rulemaking as required by federal law. Until such time as EPA undergoes the proper rulemaking process the rules set forth in the Detailed Guidance are not properly promulgated and the powers usurped by EPA through the Detailed Guidance are prohibited by the 10th Amendment of the United States Constitution.

104. Intervening Plaintiff further invokes, pursuant to 28 U.S.C. § 2202, the power and authority of the Court to enter orders for further necessary or proper relief based on a declaratory judgment, including injunctive relief and demands the Court find and order that:

105. EPA has delayed and now blocked the issuance of Section 402 KPDES permits required for operation of new and/or expanded surface coal mines in Eastern Kentucky, until and unless (i) Kentucky performs an RPA using non site-specific data from other mine sites before issuance of the permit and demonstrates that conductivity levels in new discharges will not exceed 500 $\mu\text{S}/\text{cm}$; or (ii) Kentucky develops numerical effluent limits for conductivity. EPA's actions are designed to delay and impede the issuance of any new surface coal mine in Eastern Kentucky and are arbitrary, capricious and illegal.

106. The Commonwealth of Kentucky will be irreparably harmed unless Defendants are enjoined from imposing unpromulgated rules and usurping the authority of the Commonwealth to establish and implement water quality standards within its borders.

107. The welfare of the citizens of the Commonwealth of Kentucky will be irreparably harmed unless Defendants are enjoined from unlawfully objecting to NPDES permits for coal mining operations within its borders.

XI. PRAYER FOR RELIEF

WHEREFORE, for all of the foregoing reasons, Intervening Plaintiff, Commonwealth of Kentucky, prays this Court for the following declaratory and injunctive relief:

For an order declaring that:

1. EPA is using the Interim Detailed Guidance and subsequent Final Detailed Guidance as a binding legislative rule in making Section 402 KPDES permit decisions without instituting public notice and comment rulemaking procedures in violation of the APA.

2. EPA's objection to Kentucky's NPDES permits containing the same limits and conditions that it approved prior to issuance of the Interim Detailed Guidance and subsequent Final Detailed Guidance is arbitrary and capricious and otherwise violative of the Fifth Amendment guarantee of due process.

3. EPA's objection to Kentucky's NPDES permits on the basis of the Interim and Final Detailed Guidance without public notice and comment rulemaking violates the APA and the 10th Amendment rights of the Commonwealth.

4. EPA's requirement that Kentucky apply an unpromulgated water quality standard to NPDES permits is contrary to the authority to establish and implement water quality standards given to the states in violation of the Clean Water Act, and the 10th Amendment rights of the Commonwealth.

5. The Interim Detailed Guidance and subsequent Final Detailed Guidance are contrary to the Clean Water Act, or is otherwise arbitrary, capricious, or an abuse of discretion for the reasons discussed herein, and has caused undue delay in coal mining discharge permit review and issuance affecting Kentucky permits at the federal and state levels;

6. The Interim Detailed Guidance and subsequent Final Detailed Guidance has infringed upon the authority of the Commonwealth of Kentucky to set and interpret water quality standards, to administer NPDES permits, and to monitor and protect the quality of the State's streams and the aquatic ecosystems therein;

Intervening Plaintiff, Commonwealth of Kentucky, further prays this Court for an order:

7. Permanently enjoining and restraining Defendants from utilizing the Interim and Final Detailed Guidance in its oversight of Section 402 KPDES permit decisions, and from implementing the significant changes to the Section 402 KPDES program discussed in the Interim and Final Detailed Guidance unless and until it complies with federal law and/or public notice and comment rulemaking. Specifically, Intervening Plaintiff asks the court to enjoin and restrain EPA from (i) requiring KDOW to perform a pre-permit Reasonable Potential Analysis for conductivity, total dissolved solids or sulfates for new surface coal mining facilities in Eastern Kentucky using data from adjacent mine sites, as opposed to a post-permit RPA coupled with a permit reopener using site-specific data; and (ii) from requiring KDOW to develop numerical effluent limits for conductivity until it performs a post-permit RPA for these pollutants using site-specific data and, only then, if KDOW determines that based on this RPA that such limits are required to implement Kentucky's narrative water quality standards.

8. That the Court grant such other and further relief as may be proper.

Respectfully submitted,

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